SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 588

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELECTRIC VACUUM CLEANER COMPANY, INC.; INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL 430; PATTERN MAKERS' ASSOCIATION OF CLEVELAND AND VICINITY; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54; METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3; AND FEDERAL LABOR UNION NO. 18,907,

Respondents.

MEMORANDUM FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI BY NATIONAL LABOR RELATIONS BOARD.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
ROBERT A. WILSON,
Counsel for Respondents,
736 Bowen Building,
Washington, D. C.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 588.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELECTRIC VACUUM CLEANER COMPANY, INC.; INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL 430; PATTERN MAKERS' ASSOCIATION OF CLEVELAND AND VICINITY; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54; METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3; AND FEDERAL LABOR UNION NO. 18,907.

MEMORANDUM FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI BY NATIONAL LABOR RELATIONS BOARD.

The statements concerning "Opinions Below", "Jurisdiction" and "Statute Involved" are set forth in the petition of the National Labor Relations Board and are incorporated herein by reference.

1c

Statement.

The statement of the case as set forth by the Board in its petition is a somewhat inadequate, statement of the facts and of the proceedings in this case.

The first contract entered into on June 22, 1935 (a date preceeding the enactment of the National Labor Relations Act), between the Company and the five American Federation of Labor affiliates was entered into in settlement of a lengthy strike against the Company (R. 159-160). The proof of majority submitted to the Company at the time of both the 1935 and 1936 contracts was something more than the mere ordinary union authorization card. The proof consisted of formal powers of attorney designating the American Federation of Labor as exclusive bargaining agent for one year and conferring on such union full and exclusive power and authority to act for each such employee in all matters respecting his working conditions. Such power of attorney was declared to be irrevocable and to be in full force for one year, and thereafter subject to withdrawal upon thirty days' notice in writing (R. 161, 865). A copy of the typical power of attorney is inserted in the footnote below.[1] The powers of attorney

---

[1] "AUTHORIZATION FOR REPRESENTATION

"I, the undersigned, employee of the Electric Vacuum Cleaner Co. employed as Assembler hereby authorize my

(Craft—Mechanic, Helper, or Apprentice)

Craft Organization, Affiliated with the American Federation of Labor

	Membership Fee
Metal Polishers International Union	$3.50
International Association of Machinists	3.75 and $5.00
International Molders Union of North America	3.00 and 5.00
Pattern Makers Association	5.00 and 7.00
Federal Labor Union	2.50

to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other employment conditions. I also authorize the Company to deduct, within thirty days, from wages due, the prevailing initiation or reinstatement fee of the organization as indicated

were signed by 608 out of a total of 799 employees in June, 1935, and 771 employees out of a total of 809 in July, 1936. Each of such employees was an active dues-paying member of the American Federation of Labor (R. 160).

In both instances the Company objected to a completely closed-shop contract *only* because such a contract would require the few employees who did not belong to the American Federation of Labor unions to *become members, perhaps* against their will. Accordingly, under the oral agreement, it was agreed that these "old" employees (*i. e.*, those who had never belonged to the union) would not be required to join, but that new employees would be required to join, it being clearly understood that old employees who were members would remain members (R. 160, 264, 265, 291, 688). Accordingly, the Board's statement that only new employees were obliged to become members, and that old employees who were members were not obliged to remain members under the oral contract, is incorrect. Obviously, the union would only give up as much of its demand for a closed shop as it had to; it would not gratuitously forego a requirement as to membership to which the Company had made no objection, the only contention between the parties being as to the status of the old employees who had never joined or belonged to the A. F. of L. organizations. The uncontradicted evidence appearing in the record at the foregoing record references conclusively discloses the intent and extent of the oral agreement.

---

hereon and transmit same to the authorized representative of the organization.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein.

Signature of employee.
(Union Label.)

All the union representatives were notified of the terms of the contract and, in addition, it was publicly announced by notices on plant bulletin boards that it was the intention of the company to maintain a peaceful and friendly relationship under its contracts, and that any attempt to disturb such peaceful and friendly relationship would be considered as contrary to the best interests of the Company and would be punishable by discharge (R. 291). The evidence in this respect is uncontradicted, and in the light of it the Board's characterization of the oral agreement as "secret" is hardly understandable.

The harmonious relationship between the Company and its employees resulting from the collective bargaining contracts continued for one year and nine months, at which time, in March, 1937—three months before the expiration of the 1936 contract and of the individual powers of attorney—the C. I. O. made its advent in the plant and signed up some sixty employees. It was at this time that the alleged unfair practices, consisting solely of allegedly rendering "assistance" to the A. F. of L. affiliates, took place. The American Federation of Labor, asserting its rights under its existing contract and seeking to protect and preserve such contract and to maintain harmonious relationships in the plant, insisted that various employees in the machine shop become members of the Federation (R. 752). At no time did the Company threaten any employee with discharge for refusing to join the American Federation of Labor (R. 524). Following a short-lived sit-down strike by one hundred C. I. O. sympathizers in the machine shop, occurring at the end of March, the American Federation of Labor representatives demanded that the company close the plant temporarily while an attempt could be made to straighten out the situation, threatening a strike if the request was not complied with (R. 186, 187).

On April 3rd, the American Federation of Labor entered into a supplemental agreement with the Company, requiring *all* employees to become union members. At the time the April 3rd agreement was entered into, the Company had received no notice from the C. I. O. that it even claimed to represent a majority of its employees (R. 204), and it is undisputed that no employee who had signed any one of the powers of attorney had notified either the union or the Company of an intention to withdraw his commitment. Pursuant to the terms of the April 3rd contract, the Company refused employment to 24 of the employees. The C. I. O. filed charges and hearings were ordered, culminating in the decision of the Board now under review.

Reasons for Denying the Writ.

The Board poses as the most important reason for granting the writ of certiorari the question of whether the activities of the Company carried on at the request of the American Federation of Labor and constituting the alleged unfair practices of rendering assistance were justified under a contract which provided merely for exclusive recognition. The case, however, was not decided upon that basis by the court below. Rather, the case was decided upon three different theories, each one of which alone is sufficient to support the court's decision setting aside the order of the Board.

1. The court below found that the contract made in 1936 not only required new employees to become members, but obliged all employees who were members at the time the contract was entered into to remain members. Thus, the contract was a closed-shop contract as to all except 38 of the employees the second year and 67 of the employees the first year, and "assistance" rendered under such circumstances

would not constitute a violation of the Act. The court stated in this respect as follows:

> "It [the oral contract] provided that in the future all new employees, after a probationary period of two weeks, should be compelled to join the appropriate craft union of the A. F. of L., but that the old employees, of whom some sixty-seven did not wish to join the A. F. of L., should not be compelled to do so. The respondent published notice of the contract throughout the plant and at the same time notified the employees that any one who did anything to disturb the peaceful and friendly relationship under the contract would be considered as working against the best interests of the company and subject to discharge."

Further:

> "In the instant case it was reasonable that these men should agree to exempt from the requirement of union membership the older men whose unwillingness to join the A. F. of L. was preventing the settlement of the strike initiated by the Mechanics Educational Society, and the exemption in no way affects the legality of the agreement."

Finally, the court stated:

> "In order to reach its conclusions, the Board ignored the fact that the contract of 1936, found by it to be valid under the statute, granted recognition as exclusive collective bargaining agent to the A. F. of L. and required its members to maintain and perform the contract for one year. It was an implied term of the contract that *every member of the organization* would cooperate in the enforcement of the agreement made between respondent and the A. F. of L. affiliates which he had expressly authorized to represent him in these matters, and would not take action looking toward the violation of the contract. The C. I. O. agitation, the sit-down strike, the closing of the plant, and the mak-

ing of the closed shop agreement of May, 1937, all occurred before this year had expired."

The evidence clearly supports the court's finding as to the requirements of union membership under the oral contract (see page 4, *supra*).

Thus, this Court is presented at most with a mere question of contract construction not involving a conflict in decisions or a failure to apply applicable rules of contract construction; and the question of the legality of acts of assistance under an exclusive, as distinguished from a closed-shop, contract is not before this Court.

2. In addition, the court below predicated its decision that the employer's acts were valid under the circumstances not only on what it found the oral contract to be, but also on the individual powers of attorney signed by all but 38 of the employees granting the American Federation of Labor complete authority to represent for a definite and reasonable period of one year, none of which powers of attorney had been revoked in the manner provided for. Thus, the court stated in its decision:

> "The legal conclusion made by the Board that the members of the A. F. of L., after the 1935 and 1936 contracts were executed, were free to abandon such membership at will, when considered in the light of the authorizations signed by the men and the total failure to file withdrawals in accordance therewith, is plainly erroneous. So far as the understanding of the parties illuminates the meaning of the obligation, it is that the men were bound for the period defined in the authorizations. There was no testimony to the contrary."

Further:

> "At the time that some of the old employees called a C. I. O. organizer into the plant, all but 38 of the employees working when the 1936 contract was ex-

ecuted had signed written authorizations, as hereinbefore described. These authorizations, running for a term of one year and thereafter, could be withdrawn upon thirty days written notice; but the record presents no such withdrawal. The term of one year was reasonable and the authorizations were in every respect legal. Signing the authorizations entitled the men to the benefits of union membership, including the benefits of the contract between the respondent and the affiliated unions, and they in turn were bound thereby during the term of the authorizations. They were both ethically and legally bound not to disrupt the contract. It follows that any employees who were members of the A. F. of L., whether old or new men, violated the contract when they tried to bring in a rival union, and became rightfully subject to discharge."

Neither in its decision nor in its briefs before the court below did the Board challenge the validity of these individual commitments under the Act or of their power to bind the individuals not to change affiliation for the reasonable period set forth in the commitments without following the procedure for withdrawing such authorization as provided therein. The objective of securing stability through collective bargaining relationships clearly require adherence to reasonable commitments as to affiliation and choice of bargaining agent when freely entered into. The Board itself has affirmed this principle. (*Ansley Radio Corporation*, 18 N. L. R. B. No. 108; *Douglas & Lomason Co.*, 34 N. L. R. B. No. 8. (August, 1941.) See also *Peninsula & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 41; and *Matter of Triboro Coach Corporation* (N. Y. Court of Appeals and Errors), decided July 29, 1941, L. R. R. Vol. 8, p. 845.) Particularly is this true where there is ample consideration for the commitments and a change in position is caused thereby. The individual employees received the benefits of the collective bargaining contract

obtained by their authorized representative, and the employer, relying on such commitments, undertook acts which are now branded as unfair practices.

3. Finally, the alleged illegal activities of the employer, including the making of the April 3rd closed-shop agreement, took place at a time when the American Federation of Labor represented an uncoerced majority of the Company's employees, which majority admittedly had been neither *obtained* nor *maintained* by any assistance or other unfair practice on the part of the Company. The Board made no charge and no finding that at any time during this entire period the American Federation of Labor did not represent an uncoerced majority of the employees at the plant, or a majority which had been obtained or maintained by any employer assistance. Accordingly, in the absence of such charge and such specific findings, the act of the employer in entering into the closed-shop contract of April 3rd was proper under Section 8(3) of the Act, Section 8(3) requiring merely that the contract cover an appropriate unit, and that the contracting union represent an uncoerced majority in such unit. (*International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72.) A construction which would deny a labor organization receiving *any* assistance, regardless of whether such assistance operated to obtain or maintain the necessary majority, would obviously be absurd and in derogation of the cardinal purposes of the Act—to promote the obtaining of collective bargaining contracts by valid majority representatives.

Accordingly, it is readily apparent that the fundamental reason advanced by the Board as requiring the granting of the writ—the question of whether a mere exclusive recognition contract legalizes the practices alleged to be unfair—was not passed upon by the court below. On the contrary, there are three separate and distinct grounds supporting

the court's decision and supporting its reversal of the Board's order. These are, in summary: (1) the alleged unfair activities (consisting only of allegedly giving assistance to the A. F. of L. affiliates) occurred during the existence of a contract requiring all but 38 of the Company's employees to become or remain members of the American Federation of Labor unions; (2) the alleged unfair practices occurred during the terms of valid, individual powers of attorney authorizing the A. F. of L. unions to act as exclusive representative in all their employment relationships, signed by all but 38 of the employees; (3) the Board failed to charge or find that the majority asserted by the A. F. of L. unions in support of the April 3rd closed-shop contract had either been *obtained* or *maintained* by any unfair practice on the part of the employer, and the Board made no finding that on that date the American Federation of Labor did not represent an uncoerced majority.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari prayed for by the National Labor Relations Board be denied.

Respectfully submitted,

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
ROBERT A. WILSON,
Counsel for Respondents,
736 Bowen Building, Washington, D. C.

Dated this 30th day of September, 1941.